Litnah (M) Sdn Bhd v Public Bank Bhd & Ors and other appeals

HIGH COURT (SHAH ALAM) — CIVIL APPEAL NOS BA-12BNCVC-44–12 OF 2016, BA-12BNCVC-45–12 OF 2016 AND BA-12BNCVC-46–12 OF 2016
ABD MAJID JC
19 JULY 2018

Hire Purchase — Hire-purchase agreement ('HPA') — Validity of — Customs Department seized vehicle hired under HPA for non-payment of import duty — Both hirer and finance company unaware of non-payment of duty — Hirer repudiated HPA claiming contract became frustrated and was void under ss 57 and 24, respectively, of the Contracts Act 1950 ('the CA') — Whether HPA remained valid and enforceable and not void under s 24 of the CA as vehicle was not a prohibited item but only uncustomed — Whether finance company had good title to pass to hirer — Whether hirer as buyer and possessor of vehicle was obliged to pay the unpaid customs duty under s 15(1) of the Customs Act 1967 — Whether finance company was not required under HPA to bear customs duty — Whether clause in HPA requiring hirer to indemnify finance company for loss of vehicle due to seizure, confiscation or forfeiture precluded hirer from claiming frustration of contract against finance company — Whether finance company's termination of HPA for non-payment of instalments by hirer valid — Whether Road Transport Department owed no duty of care to hirer to ensure all documents used in registration of vehicle were authentic

The appellant bought a motor vehicle from a used-car dealer ('D2') and entered into a hire-purchase agreement ('the HPA') with the first respondent ('PBB') to finance the purchase. While the vehicle was in the appellant's possession, it was seized by the Customs Department ('D3') on the ground import duty on the vehicle had not been paid. Prior to the appellant's purchase of the vehicle, and unknown to the appellant, the vehicle was first registered in Langkawi, where it was not subject to duty because of the island's duty-free status, before it was brought over to the mainland where a new registration number for it was registered with the Road Transport Department ('D4') using a forged document ('K1'). Following the seizure, the appellant repudiated the HPA and sued PBB (for a declaration that the HPA was null and void), D2 (for breach of contract, fraud and misrepresentation), and D3, D4 and D5 (the Government of Malaysia) for negligently allowing the vehicle to be registered using a forged document. PBB counterclaimed against the appellant and filed a third-party notice against D2 for indemnity. The sessions court dismissed the appellant's claims against PBB and D3, D4 and D5 but allowed its claim against D2. PBB's counterclaim was allowed but its third-party notice was

dismissed. The court held that the HPA was valid and enforceable; that the appellant was liable to pay the customs duty on the vehicle, and that the sale and purchase agreement between the appellant and D2 was null and void. The instant three appeals against that decision were brought by the following parties — the appellant, against the dismissal of its claim against PBB, D3, D4 and D5; PBB against the dismissal of its third-party proceedings; and D2 against the finding that it was liable to the appellant. At the appeal hearings, the appellant argued that: (a) D2's appeal should be dismissed because its memorandum of appeal was defective for lacking in particulars under O 55 r 4(3) and (4) of the Rules of Court 2012; (b) the appellant should not be held liable in any way because it had bought the vehicle bona fide after inspecting it and the vehicle's registration card; and (c) PBB's counterclaim should be dismissed because the appellant was not privy to the forgery; the HPA was void under s 24 of the Contracts Act 1950; PBB did not have good title to pass and there was a total failure of consideration. As against D3, D4 and D5, the appellant argued that the trial court should have found them negligent, particularly D4 for breaching its duty of care to the appellant to ensure that K1 was authentic before registering the vehicle.

Held, dismissing all the three appeals:

(1) The court agreed with the appellant's preliminary objection that D2's memorandum of appeal was too general and devoid of any ground. D2's appeal was therefore dismissed (see para 8).

(2) The HPA was not void under s 24 of the Contracts Act 1950 just because the vehicle was uncustomed. The vehicle was not a prohibited item but merely uncustomed and that situation could be remedied by paying the customs duty. The trial court rightly found that PBB had good title to the vehicle and that the HPA was valid and enforceable (see paras 16 & 21).

(3) The appellant could not show where in the HPA PBB had undertaken to ensure that all duties were paid. On the contrary, the HPA made clear provisions pertaining to the appellant's responsibilities thereunder. Premised on those provisions, PBB was not responsible for paying the customs duty. Under s 15(1) of the Customs Act 1967 both the importer and the appellant were jointly and severally liable to pay the customs duty. But since the appellant had bought the vehicle and was in possession of it before it was seized, it was liable to pay the customs duty. It could choose not to pay, in which case it would lose the vehicle. The option was the appellant's. Accordingly, the trial court was right in holding that under s 15(1), the appellant was responsible, as the hirer under the HPA, to pay the customs duty (see paras 23 & 32).

(4) Clause 9 of the HPA provided that the appellant, as hirer, shall indemnify PBB, as the owner, against any loss or damage to the vehicle by any means whatsoever including seizure, confiscation or forfeiture. Based on that

clause and case law, the doctrine of frustration had no application to the facts of these appeals. There was no total failure of consideration as the vehicle could be released to the appellant if the duty was paid. The appellant's claim against PBB therefore failed (see paras 26–27).

(5) The trial court rightly allowed PBB's counterclaim against the appellant. PBB rightfully terminated the HPA on the appellant's failure to pay the instalments thereunder. The vehicle was lawfully seized by the Customs Department; therefore, the loss of use of the vehicle was not caused by PBB (see para 28).

(6) D4 could not be made liable for not verifying the authenticity of K1 as K1 was not issued by D4, nor was it a prescribed form under the Road Transport Act 1987. It was unreasonable to impose a duty of care on D4 to verify K1's authenticity. The trial judge therefore did not misdirect herself in holding that D3, D4 and D5 were not liable to the appellant (see paras 34–35).

(7) Since the appellant's appeal against PBB was dismissed, it followed that PBB's appeal against the dismissal of its third-party proceedings against D2 also had to be dismissed (see para 36).

[Bahasa Malaysia summary

Perayu membeli kenderaan bermotor dari peniaga kereta terpakai ('D2') dan memeterai perjanjian sewa beli ('HPA') dengan responden pertama ('PBB') untuk membiayai pembelian. Semasa kenderaan tersebut berada dalam pemilikan perayu, ia telah disita oleh Jabatan Kastam ('D3') atas alasan duti import ke atas kenderaan tersebut belum dibayar. Sebelum perayu membeli kenderaan tersebut, dan tidak diketahui oleh perayu, kenderaan tersebut mula-mula didaftarkan di Langkawi, di mana ia tidak dikenakan duti kerana status bebas cukai pulau tersebut, sebelum ia dibawa ke tanah besar di mana nombor pendaftaran baru didaftarkan dengan Jabatan Pengangkutan Jalan ('D4') menggunakan dokumen palsu ('K1'). Berikutan penyitaan tersebut, perayu menolak HPA dan menyaman PBB (untuk pengisytiharan bahawa HPA adalah batal dan tidak sah), D2 (untuk pelanggaran kontrak, penipuan dan pemalsuan), dan D3, D4 dan D5 (Kerajaan Malaysia) untuk secara cuai membenarkan kenderaan tersebut didaftarkan menggunakan dokumen palsu. PBB menuntut balas perayu dan memfailkan notis pihak ketiga terhadap D2 untuk indemniti. Mahkamah sesyen menolak tuntutan perayu terhadap PBB dan D3, D4 dan D5 tetapi membenarkan tuntutannya terhadap D2. Tuntutan balas PBB dibenarkan tetapi notis pihak ketiganya ditolak. Mahkamah memutuskan bahawa HPA adalah sah dan boleh dikuatkuasakan; bahawa perayu bertanggungjawab untuk membayar duti kastam ke atas kenderaan tersebut, dan perjanjian jual beli antara perayu dan D2 adalah batal dan tidak sah. Tiga rayuan ini terhadap keputusan tersebut dibawa oleh pihak-pihak berikut — perayu, terhadap penolakan tuntutannya terhadap PBB, D3, D4

dan D5; PBB terhadap penolakan prosiding pihak ketiga; dan D2 terhadap dapatan bahawa ia bertanggungjawab terhadap perayu. Pada perbicaraan rayuan, perayu berhujah bahawa: (a) rayuan D2 hendaklah ditolak kerana memorandum rayuannya cacat kerana kekurangan perincian di bawah A 55 k 4(3) dan (4) Kaedah-Kaedah Mahkamah 2012: (b) perayu tidak boleh dipertanggungjawabkan dalam apa cara sekalipun kerana ia telah bona fide membeli kenderaan tersebut selepas memeriksanya dan kad pendaftaran kenderaan tersebut; and (c) tuntutan balas PBB harus ditolak kerana perayu bukan privi terhadap pemalsuan; HPA tidak sah di bawah s 24 Akta Kontrak 1950; PBB tidak mempunyai hak milik baik untuk memindah dan terdapat kegagalan keseluruhan pertimbangan. Sebaliknya terhadap D3, D4 dan D5, perayu berpendapat bahawa mahkamah bicara sepatutnya mendapati mereka lalai, terutamanya D4 kerana melanggar kewajipannya kepada perayu untuk memastikan bahawa K1 adalah sahih sebelum mendaftarkan kenderaan tersebut.

Diputuskan, menolak ketiga-tiga rayuan:

(1) Mahkamah bersetuju dengan bantahan awal perayu bahawa memorandum rayuan D2 adalah terlalu umum dan tidak mempunyai apa-apa alasan. Oleh itu, rayuan D2 ditolak (lihat perenggan 8).

(2) HPA tidak batal di bawah s 24 Akta Kontrak 1950 hanya kerana kenderaan tersebut tidak dicukai. Kenderaan tersebut bukanlah item terlarang tetapi hanya tidak dicukai dan keadaan itu boleh diperbaiki dengan membayar duti kastam. Mahkamah bicara dengan betul mendapati PBB mempunyai hak milik baik untuk kenderaan tersebut dan HPA adalah sah dan boleh dikuatkuasakan (lihat perenggan 16 & 21).

(3) Perayu tidak dapat menunjukkan di mana di dalam HPA PBB telah memastikan semua duti telah dibayar. Sebaliknya, HPA membuat peruntukan yang jelas mengenai tanggungjawab perayu di bawahnya. berasakan pada peruntukan tersebut, PBB tidak bertanggungjawab untuk membayar duti kastam. Di bawah s 15(1) Akta Kastam 1967 kedua-dua pengimport dan perayu secara bersama dan bertanggungjawab membayar duti kastam. Tetapi, oleh kerana perayu telah membeli kenderaan tersebut dan telah memilikinya sebelum ia disita, ia bertanggungjawab untuk membayar duti kastam. Ia boleh memilih untuk tidak membayar, di mana ia akan kehilangan kenderaan. Pilihannya adalah pada perayu. Oleh itu, mahkamah bicara adalah betul untuk memutuskan bahawa di bawah s 15(1), perayu bertanggungjawab, sebagai penyewa di bawah HPA, untuk membayar duti kastam (lihat perenggan 23 & 32).

(4) Klausa 9 HPA menyatakan bahawa perayu, sebagai penyewa, hendaklah indemniti PBB, sebagai pemilik, terhadap apa-apa kerugian atau

kerosakan kepada kenderaan dengan apa jua cara termasuk penyitaan, rampasan atau pelucuthakan. Berdasarkan klausa dan kes undang-undang, doktrin kekecewaan tidak terpakai kepada fakta rayuan ini. Tiada kegagalan balasan kerana kenderaan tersebut boleh dibebaskan kepada perayu jika duti tersebut dibayar. Tuntutan perayu terhadap PBB oleh itu gagal (lihat perenggan 26–27).

(5) Mahkamah bicara dengan betul membenarkan tuntutan balas PBB terhadap perayu. PBB dengan betul menamatkan HPA atas kegagalan perayu untuk membayar ansuran di bawahnya. Kenderaan tersebut disita secara sah oleh Jabatan Kastam; oleh itu, kehilangan penggunaan kenderaan tersebut tidak disebabkan oleh PBB (lihat perenggan 28).

(6) D4 tidak boleh dipertanggungjawabkan kerana tidak mengesahkan keaslian K1 kerana K1 tidak dikeluarkan oleh D4, ataupun borang yang ditetapkan di bawah Akta Pengangkutan Jalan 1987. Adalah tidak munasabah untuk mengenakan kewajipan berjaga-jaga pada D4 untuk mengesahkan ketulenan K1. Oleh itu, hakim bicara tidak tersalah arah dalam memutuskan bahawa D3, D4 dan D5 tidak bertanggungjawab terhadap perayu (lihat perenggan 34 & 35).

(7) Oleh kerana rayuan perayu terhadap PBB ditolak, ia diikuti rayuan PBB terhadap penolakan prosiding pihak ketiga terhadap D2 juga harus ditolak (lihat perenggan 36).]

Notes

For cases on validity of hire purchase agreement, see 7(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5153–5155.

Cases referred to

Chin Jit Pyng & Ors v Ketua Pengarah Kastam & Anor [2017] 3 CLJ 176, HC (refd)

Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd [2007] 4 MLJ 201; [2007] 3 CLJ 695, CA (refd)

Hong Leong Bank Bhd v Jeyaprakash Pillay a/l Jegaualthan and another appeal [2016] 4 MLJ 741; [2016] 8 CLJ 195, CA (refd)

Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor [2015] 4 MLJ 734; [2015] 7 CLJ 1008; [2015] 5 AMR 185, FC (refd)

Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah [2015] 5 MLJ 619; [2015] 8 CLJ 212; [2015] 5 MLRA 377, FC (refd)

Pengarah Jabatan Pengangkutan Negeri Selangor & Ors v Sin Yoong Ming [2015] 1 MLJ 1; [2015] 1 CLJ 1, FC (refd)

Sandanatavan Marimuthu & Anor v Badan Pengurusan Bersama — PV3; TSS Security Services Sdn Bhd (Third Party) [2015] 2 CLJ 844, HC (refd)

Selvaraju a/l Velasamy & Anor v Abdullah Ali Kutty & Ors [2009] 8 MLJ 267; [2009] 2 CLJ 753, HC (refd)

Warman v Southern Counties Car Finance Corporation Ltd (W J Ameris Car Sales, Third Party) [1949] 1 All ER 711; [1949] 2 KB 576, KBD (distd)

Legislation referred to

Contracts Act 1950 s 24, 57
Customs Act 1967 ss 14, 15, 15(1), 114, 116A
Customs (Exemption) Duties Order 1988 cl 21A
Hire-Purchase Act 1967 s 7(1), (1)(a), (1)(c)
Road Transport Act 1987 ss 10, 12, 13
Rules of Court 2012 O 55 r 4(3), (4)

Srimurugan Alagan (Srimurugan & Co) in Civil Appeal No BA-12BNCVC-44–12 of 2016 for the appellant.
GC Tan (Dennise Teoh with him) (Shook Lin & Bok) in Civil Appeal No BA-12BNCVC-45–12 of 2016 for the appellant.
GC Tan (Dennise Teoh with him) (Shook Lin & Bok) in Civil Appeal No BA-12BNCVC-44–12 of 2016 for the first respondent.
Sandra (Federal Counsel, Attorney General's Chambers) in Civil Appeal No BA-12BNCVC-44–12 of 2016 for the second, third and fourth respondents.
Priya Sukirthanandan (Priya & Assocs) in Civil Appeal No BA-12BNCVC-45–12 of 2016 for the respondent.

Abd Majid JC:

INTRODUCTION

[1] There are three appeals filed against the decisions of the learned sessions court judge ('SCJ') and I shall refer them as they were before the court below.

BACKGROUND FACTS

[2] The plaintiff had purchased a used Mitsubishi Pajero bearing the registration No WWR 6202 ('vehicle') from the second defendant a used car dealer for a sum of RM131,000 and paid RM44,702.42 as part payment and deposit. In order to finance the purchase, the plaintiff entered into a hire purchase agreement ('HPA') with the first defendant on 17 May 2012 and on 24 May 2012 the vehicle was registered under the plaintiff's name. On 28 May 2013, the said vehicle was seized by the third defendant on the account that duty was not paid when it was brought into the mainland (principal customs area) from Langkawi and as a result of this, the plaintiff sent a letter to the first defendant to repudiate the HPA.

[3] Thereafter, the plaintiff commenced this action in the sessions court (B52NCVC-48–10 of 2013) against:

(a) the first defendant for a declaration that the HPA is null and void;

(b) the second defendant for breach of contract, fraud, misrepresentation; and

(c) the third, fourth and fifth defendants for being negligent in allowing the vehicle to be registered and in such process allowed a forged document to be used.

[4] The first defendant filed a counterclaim against the plaintiff and a third party proceedings against the second defendant for indemnity.

DECISION OF THE SESSIONS COURT

[5] The learned SCJ:

(a) dismissed the plaintiff's claim against the first defendant;

(b) allowed the first defendant's counterclaim;

(c) dismissed the first defendant's third party claim for indemnity from the second defendant;

(d) allowed the plaintiff's claim against the second defendant;

(e) the sale and purchase agreement ('SPA') between the plaintiff and the second defendant was declared null and void; and

(f) dismissed the plaintiff's claim against the third, fourth and fifth defendants and that the plaintiff was liable to pay the customs duty.

[6] As against the decision of the SCJ, three appeals were filed before this court namely:

(a) BA-12BNCVC-44–12 of 2016 — the plaintiff's appeal against the dismissal of its claim against the first, third, fourth and fifth defendants;

(b) BA-12BNCVC-45–12 of 2016 — the first defendant's appeal against the dismissal of its third party proceedings against the second defendant; and

(c) BA-12BNCVC-46–12 of 2016 — the second defendant's appeal against the finding of allowing the plaintiff's claim.

[7] Having heard the submissions advanced by all parties, I dismissed all the three appeals with costs.

[8] The plaintiff raised a preliminary objection in that the memorandum of appeal filed by the second defendant was defective for lack of particulars. Learned counsel for the plaintiff referred to O 55 r 4(3), (4) of the Rules of Court 2012 ('the RC 2012') and urged the court to dismiss the said appeal. In

response, learned counsel for the second defendant informed the court that she had no instruction from the second defendant. Having read the memorandum of appeal, I agreed that the said memorandum was too general and devoid of any ground hence, the appeal was dismissed with costs.

[9] The second defendant did not file an appeal against the order I made.

[10] Learned counsel for the plaintiff submitted that the plaintiff was a bona fide purchaser, having inspected the vehicle and relied on the registration card, he proceeded to purchase the said vehicle from the second defendant. The history of the vehicle is a follows:

(a) 16 August 2010 the vehicle was first registered in Langkawi bearing the registration No KV 848 D under one Shafinah bt Abu Hassan;

(b) 10 January 2012 it was subsequently transferred to one Yusriza bt Bahari;

(c) 24 April 2012 Yusriza bt Bahari applied to cancel 'syarat K' and allegedly had paid the customs duty (Borang K1) and brought the vehicle into the mainland;

(d) 2 May 2012 Yusriza bt Bahari applied to change the registration number of the said vehicle to WWR 6202;

(e) 24 May 2012 the said vehicle was registered under the plaintiff's name; and

(f) 17 July 2013 the third defendant offered a temporary release of the said vehicle to the plaintiff which the plaintiff had declined.

[11] There was no dispute that Borang K1 was a forged document. With respect to the HPA entered with the first defendant, learned counsel argued that the learned SCJ had misdirected herself in failing to find the followings:

(a) the first defendant did not possess a good title as there was a breach of sub-s 7(1)(a) and (c) of the Hire-Purchase Act 1967 and that there was a total failure of consideration;

(b) the HPA was void under s 24 of the Contracts Act 1950; and

(c) the plaintiff was not liable to pay the customs duty and that the plaintiff was not privy to the forgery hence, the counterclaim ought to have been dismissed.

[12] In response, learned counsel for the first respondent contended the followings:

(a) the seizure of the vehicle was for want of payment of customs duty and not for want of title;

(b) the said vehicle was merely an uncustomed and not a prohibited goods thus, s 24 has no application and that the HPA was valid;

(c) there has been no violation of sub-s 7(1)(a) of the Hire-Purchase Act; and

(d) the doctrine of frustration did not apply and that the plaintiff was liable to pay the customs duty.

[13] As against the third, fourth and fifth defendants, learned counsel for the plaintiff contended that the learned SCJ failed to find the followings:

(a) negligence on the part of the third, fourth and fifth defendants; and

(b) the fourth defendant owed a duty of care towards the plaintiff in that the fourth defendant should have verified Borang K1 in particular when the process of registration was being carried out.

[14] In response, the learned federal counsel ('FC') argued that:

(a) the fourth defendant had relied on Borang K1 and only the third defendant was able to identify that the said form was forged;

(b) there was no duty imposed statutorily or duty of care owed by the fourth defendant to the plaintiff in that the fourth defendant ought to verify Borang K1 before allowing the vehicle to be registered;

(c) there was also nothing to indicate that Borang K1 was a forged document at the time when the transfer to the plaintiff was effected; and

(d) the said vehicle was legally seized.

DECISION

Against the first defendant

Validity of the HPA

[15] The plaintiff did not plead illegality. However, it is trite that illegality need not be pleaded. See *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619; [2015] 8 CLJ 212; [2015] 5 MLRA 377. Section 24 of the Contracts Act 1950 provides as follows:

24 The consideration or object of an agreement is lawful, unless:

(a) it is forbidden by a law;

(b) it is of such a nature that, if permitted, it would defeat any law;

(c) it is fraudulent;

(d) it involves or implies injury to the person or property of another; or

A (e) the court regards it as immoral, or opposed to public policy.

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

B **[16]** When the HPA was entered, both the plaintiff and the first defendant were not aware that customs duty had not been paid. I cannot agree with the submission of learned counsel for the plaintiff that owing to the fact that the said vehicle being an uncustomed good the HPA became void under s 24 of the Contracts Act 1950. The said vehicle was not a prohibited item in the first place C but merely uncustomed which could be regularised by paying the customs duty. Hence, to my mind s 24 of the Contracts Act 1950 is irrelevant.

[17] Subsection 7(1) of the Hire-Purchase Act 1967 provides as follows:

7(1) In every hire-purchase agreement there shall be:

D (a) an implied warranty that the hirer shall have and enjoy quiet possession of the goods;

(b) ...;

E (c) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party at the time when the property is to pass.

No doubt one must possess a good title before one can pass the chattel to another and the hirer should be able to enjoy quiet possession of the said F chattel. Learned counsel for the plaintiff referred to *Warman v Southern Counties Car Finance Corporation Ltd (W J Ameris Car Sales, Third Party)* [1949] 1 All ER 711; [1949] 2 KB 576; and extracts from *The Law of Hire-Purchase* by AG Guest (Sweet & Maxwell) London 1966 in support of this statement of law.

G **[18]** What transpired in the appeal before me is distinguishable from that in *Warman* as the vehicle in *Warman*'s case was actually owned by London Finance Corporation and not the defendant. Obviously, the defendant had no good title to pass on. On the contrary, the vehicle in this appeal does not H concern any defect in its title. As said earlier, its status can be regularised by paying the customs duty.

[19] In *Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd* [2007] 4 MLJ 201; [2007] 4 MLJ 201; [2007] 3 CLJ 695 the car which was I let on a hire-purchase agreement was seized by the Royal Malaysian Customs due to default in payment of duty. The plaintiff commenced action against the first defendant after the latter defaulted in paying the instalments subsequent to the seizure. The defendants claimed that the plaintiff had no title to the said car and the hire-purchase agreement was frustrated. The Court of Appeal held

that the terms of the hire-purchase agreement imposed no obligation upon the plaintiff to ensure the import duty was paid and held that the plaintiff had good title to the car. Speaking for the Court of Appeal, Gopal Sri Ram JCA (as he then was) at p 205 (MLJ); pp 700–701 (CLJ) said:

> It follows that on a reading of the hire-purchase agreement as a whole, there was no promise by the plaintiff that it would ensure that all duty due would be paid. In the absence of a clearly worded provision in a hire-purchase agreement imposing such an obligation, courts should not do so. For it does not accord with commercial reality that a finance provider in a hire-purchase transaction involving an imported car should be made to undertake such an onerous obligation. Hence cl 9, the clause warranting title has no application to the facts of this case as the plaintiff did have good title to the car. It was not for want of title that the car was seized. It was seized because duty had not been paid.

[20] In *Hong Leong Bank Bhd v Jeyaprakash Pillay a/l Jegaualthan and another appeal* [2016] 4 MLJ 741; [2016] 8 CLJ 195 the car was also seized by the Royal Malaysian Customs for being uncustomed. The Court of Appeal held that the hire-purchase agreement was held to be valid in the absence of clear contractual provision making the financier to bear or undertake to bear customs duty for vehicles under hire-purchase.

[21] Although in these cases there was no forgery involved, to my mind, it makes no difference as far as the first defendant is concerned. Hence, the learned SCJ was correct in finding that the first defendant has good title to the said vehicle and that the HPA between the plaintiff and the first defendant was valid and enforceable.

Customs duty

[22] The learned SCJ held that the plaintiff was to pay the customs duty. This finding was premised on *Jeyaprakash* hence, there was no misdirection here. Nallini Pathmanathan JCA at p 755 (MLJ); p 210 (CLJ) had this to say:

> The duty or obligation to do so lies (contractually generally) with the hirer or the dealer. It is therefore clear on the facts of this case that the learned High Court judge erred in law and in fact in allowing the hirer's appeal in part.

[23] It was further held by the Court of Appeal in *Jeyaprakash* that customs duty would be borne by either the hirer or dealer. The plaintiff was not able to show where in the HPA that the first defendant undertook to ensure all duties were paid. On the contrary, the HPA makes clear provisions pertaining to the plaintiff's responsibilities, in particular clauses:

> 6.1.4
>
> Obtain all the necessary licenses, permits and permissions for the use of the Goods

A and not use the Goods or permit the same to be used contrary to law or any regulations or bylaw for the time being in force.

6.1.5

... shall bear all costs and expenses, including the legal costs on solicitors and client
B basis to have the Goods released therefrom.

Hence, premised on these clear provisions, the First Defendant is not responsible to bear the customs duty.

Frustration
C

[24] Section 57 of the Contracts Act 1950 provides as follows:

57 Agreement to do impossible act

(1) An agreement to do an act impossible in itself is void.
D

Contract to do act afterwards becoming impossible or unlawful

(2) A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.
E

[25] In *Guan Aik Moh* the Court of Appeal also considered whether the doctrine of frustration applied to the hire-purchase agreement in that case. Having referred to two authorities, Gopal Sri Ram JCA (as he then was)
F identified 'three elements woven into the fabric of the doctrine embodied in s 57'. He said:

First, the event upon which the promisor relies as having frustrated the contract must have been one for which no provision has been made in the contract. If provision has been made then the parties must be taken to have allocated the risk
G between them. Second, the event relied upon by the promisor must be one for which he or she is not responsible. Put shortly, self-induced frustration is ineffective. Third, the event which is said to discharge the promise must be such that renders it radically different from that which was undertaken by the contract. The court must find it practically unjust to enforce the original promise. If any of these elements are
H not present on the facts of a given case, then s 57 does not bite.

Now test the facts of the present instance for these three elements and you will find two of them absent. First, this is a case in which the parties specifically provided for the event relied on by the first defendant as promisor. It is to be found in cl 3(b) of the hire purchase agreement which states that 'the hirer (that is to say the first
I defendant) shall indemnify the owner (the plaintiff) against the destruction or loss of goods (including lawful forfeiture)'. Here there was a lawful forfeiture by the Customs. The risk of that happening was allocated to the first defendant by the contract. So cl 3(b) applies and s 57 is excluded. Second, as I have already said, it was for the first defendant to have ensured that the duty was paid by its agent. It did not. It merely relied on its agent to make payment. That did not happen. So, if this is a

case of frustration then it was self-induced. For that reason, again s 57 does not apply. A

[26] In the present appeal, cl 9 of the HPA states as follows:

IX LOSS OF AND DAMAGE TO GOODS B

9 The Hirer shall indemnify the owner against loss of or damage to the Goods or any part thereof from any cause or by any means whatsoever including seizure, confiscation or forfeiture ...

C

Based on the above authority since the HPA contains this provision the said doctrine has no application to the facts of this appeal.

[27] Therefore, there was no total failure of consideration and that the vehicle can be released to the plaintiff provided the plaintiff pays the duty. I D agree with the learned SCJ that the claim against the first defendant must fail.

COUNTERCLAIM

[28] The vehicle was lawfully seized by the Royal Malaysian Customs hence, E the loss of use was not caused by the first defendant. There was no dispute that the plaintiff has defaulted in paying the installments and the first defendant therefore rightfully terminated the HPA. Based on the above reasons, I find no reason to reverse the decision of the SCJ in allowing the first defendant's counterclaim against the plaintiff. F

Against the third, fourth and fifth defendants

[29] The seizure of the vehicle by the third defendant was done under s 114 of the Customs Act 1967 vide notice issued on 28 May 2013 having found that G customs duty had not been paid for the vehicle after an investigation done under s 116A. Notice for the same was issued on 23 May 2013. Thereafter, the third defendant vide a letter dated 17 July 2013 offered to release the vehicle on bond to the plaintiff with a condition that the plaintiff to deposit a sum of RM8,567.19 being the 10% of the duty payable. The plaintiff turned down H this offer claiming that they were not liable to pay the said duty.

[30] The learned SCJ found that the plaintiff was liable to pay the customs duty based on sub-s 15(1) of the Customs Act 1967. It was argued by learned counsel for the plaintiff that the learned SCJ misconstrued sub-s 15(1) in that I the word 'and' was employed in making both the person to whom exemption was given under s 14 and the person found in possession of the goods to pay the duty. It was contended that the learned SCJ would be correct to make the plaintiff liable if the word 'or' was used. Section 15 provides for re-imposition

of duty and read as follows:

> 15(1) If any goods, on which customs duty has not been paid by reason of an exemption granted under section 14, cease to comply with the conditions subject to which such exemption was granted or cease to be kept or used by the person or for the purposes qualifying them for such exemption, such goods shall, upon such cesser, become liable to the customs duty and the person to whom such exemption was granted and any person found in possession of such goods shall be jointly and severally liable to pay such customs duty.
>
> (2) If any goods, which are liable to customs duty under subsection (1) and on which such duty has not been paid, are found in the possession or on the premises of any person other than the person authorised to possess them under the terms of such exemption, such goods shall, until the contrary is proved, be deemed to be uncustomed goods.

The exemption given by s 14 is either to the goods or any person from paying customs duty either wholly or partially subject to conditions that may be imposed. It follows that if the conditions imposed when the exemption given were not complied with, the duty will be re-imposed.

[31] In this appeal, the vehicle first being registered in Langkawi and duty was suspended for Langkawi is a tax-free island. However, the vehicle may be brought into the mainland without duty being paid for a period of 30 days but for a fixed period in accordance with cl 21A of the Customs (Exemption) Duties Order 1988 and it has to return to the island thereafter. Without the tax free status, the vehicle is a dutiable goods.

[32] The said vehicle was indeed given the exemption and it was brought into the mainland on 10 January 2012 but never returned. And, by way of a forged document (Borang K1) the vehicle obtained a new registration number on the mainland and eventually sold to the plaintiff. The vehicle therefore became an uncustomed goods as duty has not been paid and the said duty ought to be collected. If the importer can be found the duty will be collected from him however, the said vehicle had been sold to the plaintiff and the plaintiff was in possession of the vehicle before it was seized. Subsection 15(1) provides that both the importer and the plaintiff to be jointly and severally liable to pay such customs duty. As the vehicle has been purchased by the plaintiff therefore, the plaintiff is liable to pay the customs duty. He may choose not to pay but he will lose the vehicle. The option was his. Hence, I agree with the findings of the learned SCJ that under sub-s 15(1) the plaintiff is responsible being the current hirer under HPA to pay the customs duty. A concurrent finding can be found in *Chin Jit Pyng & Ors v Ketua Pengarah Kastam & Anor* [2017] 3 CLJ 176.

[33] As regards the fourth defendant, the issue here to my mind, is whether it was incumbent upon the fourth defendant in the process of registering the

said vehicle to verify Borang K1. Learned counsel for the plaintiff submitted that it was and that there existed a duty owed to the plaintiff to ensure that the vehicle was fit to be legally registered. The relevant provisions under the Road Transport Act 1987 for registration of motor vehicles and change of ownership are ss 10, 12 and 13. The cases of *Selvaraju a/l Velasamy & Anor v Abdullah Ali Kutty & Ors* [2009] 8 MLJ 267; [2009] 2 CLJ 753; *Sandanatavan Marimuthu & Anor v Badan Pengurusan Bersama — PV3; TSS Security Services Sdn Bhd (Third Party)* [2015] 2 CLJ 844; *Pengarah Jabatan Pengangkutan Negeri Selangor & Ors v Sin Yoong Ming* [2015] 1 MLJ 1; [2015] 1 CLJ 1; and *Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor* [2015] 4 MLJ 734; [2015] 7 CLJ 1008; [2015] 5 AMR 185 were referred to.

[34] However, in this appeal, we are not concerned with inspection of the vehicle but documents presented for purposes of registration. I do not think the fourth defendant can be made liable for failing to verify the authenticity of Borang K1. Borang K1 is not issued by their department nor a prescribed form in the Road Transport Act 1987. In *Selvaraju* the Road Transport Department was sued as the third defendant for accepting a forged insurance certificate and thereby wrongfully issued a motor vehicle licence to the second defendant. Vernon Ong Lam Kiat JC (as he then was) after having examined the relevant provisions of the Road Transport Act, at p 783 said as follows:

> To conclude, there is no statutory duty on the part of the 3rd defendant to ensure that the certificate of insurance lodged on an application is valid and not a forgery. The court also found that the 3rd defendant did not owe a common law duty of care in this regard. In the particular circumstances of this case the loss and damage to the plaintiffs was not foreseeable as: (i) the accident occurred on a date prior to the JPJ search; and (ii) the information provided in the JPJ search could not possibly have caused or led to the plaintiffs' injury or damage. Secondly, the basic elements of assumed responsibility on the part of the 3rd defendant and reliance on the part of the plaintiffs did not exist to create a sufficiently proximate relationship between the plaintiffs and the 3rd defendant. Thirdly, the imposition of this additional responsibility would be impractical as it would not only require all counter clerks to be trained in the science of detection of forged certificates of insurance but also incur undue delay in the processing of applications. It is therefore not just or reasonable to impose a duty of care on the 3rd defendant. Applying the three tests laid down in *Caparo*, to the particular circumstances of this case there is clearly no common law duty of care owed by the 3rd defendant to road users to ensure that the certificate of insurance is valid and not a forgery.

Similarly here, it would not be reasonable for the fourth defendant to verify Borang K1 which would be tagged along with all the relevant forms required for the purposes of registration and change of ownership of the vehicle.

[35] Hence, the learned SCJ did not misdirect herself in concluding that the third, fourth and fifth defendants were not liable.

A BA-12BNCVC-45–12 of 2016

[36] The first defendant has no option but to continue filing an appeal against the dismissal of its third party proceedings against the second defendant to protect its interest in the event the plaintiff's appeal is allowed. As the plaintiff's appeal against the first defendant is dismissed it follows that the first defendant's appeal against the dismissal of the third party proceedings is also dismissed.

[37] All the three appeals are dismissed with costs.

Appeals dismissed.

Reported by Ashok Kumar